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BEFORE THE DEPARTMENT  
OF NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

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IN THE MATTER OF THE APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT ) FINAL ORDER  
NO. 56031-41S BY FLOYD BLAIR )

\* \* \* \* \*

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. Timely exceptions were received from the Applicant.

Having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the April 22, 1988 Proposal for Decision, except for the modifications specified below, and incorporates them herein by reference.

RESPONSE TO EXCEPTIONS

Applicant Floyd Blair has excepted to the proposed bypass flow requirement on the Permit in this matter, alleged that a "measurement station" must be established downstream on the source, and excepted to the point of diversion specified for the Permit.

1. The Applicant argues that the 6 cfs bypass flow requirement imposed by the Hearing Examiner is arbitrary and capricious and, if any bypass flow amount is required, it should be limited to the 1 cfs which the Applicant testified he allows past his diversions.

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The Applicant further argues that the record does not support requiring a constant instream flow for downstream stockwater use, and that the Objectors should be limited to calling for the water when they need it.

The Applicant cannot be granted a permit unless the criteria of MCA §85-2-311 can be met, including the criterion that the water rights of a prior appropriator will not be adversely affected. In the present matter, this requirement involves ensuring that the downstream stockwatering rights of the Objectors and other appropriators will not be adversely affected. These downstream water users must be able to obtain water at the times and in the quantities necessary to meet their needs.

A review of the record in this matter indicates that, contrary to the Applicant's allegations, there is evidence that an instream flow is necessary at all times to meet downstream stockwater needs. Testimony by Objectors indicates that they use Wolf Creek for stockwatering year-round. (See, e.g., testimony of Don Barber, Peter Barber.) In order that these senior water uses must be met, water must flow to the lower reaches of Wolf Creek at all times.

Having the Objectors call the stream in order to obtain water is not an adequate means of ensuring stockwater reaches the downstream users when they need it. Testimony by Sterling Sundheim indicates that water released by the Applicant possibly may take as much as a couple of days to reach downstream stockwater users, and that the water might not reach the Objectors if it was released only upon call (presumably because the streambed would have to be recharged). This, in conjunction with the fact that the creek is used regularly

for stockwatering (with no periods of time when the water is not needed), indicates that a constant instream flow must be ensured to avoid adverse effect. This has been done in the present matter by conditioning the permit to require the Applicant to maintain a bypass flow. See MCA §85-2-312.

Testimony in the record indicates that the 1 cfs bypass flow presently utilized by the Applicant is not sufficient to prevent adverse effect to the Objectors' water rights. Several Objectors testified that they have experienced water availability problems in the last few years, during the time that the Applicant has been appropriating upstream, and that they feel the problems are due in part to the Applicant's diversions as well as to the weather.

The Applicant testified that he did not have any idea to how much flow was required to get stockwater all the way down Wolf Creek to Christians. He stated that he had assumed 1 cfs was enough bypass flow because none of the Objectors had called him, whereas the Objectors testified that they had not been aware of the Applicant's mode of operation. Whether or not the Objectors have been remiss in not calling the Applicant is beside the point, however, since the evidence in the record indicates that the Objectors have experienced water shortages when the Applicant is bypassing only 1 cfs.

The question that it is then necessary to decide is how much water will be enough to maintain a sufficient flow in Wolf Creek to meet the downstream users' stockwatering needs, if 1 cfs is not sufficient. On this point, the record does not provide any clearcut information. The testimony indicates that Wolf Creek is a losing

stream in the intervening stretch between the Applicant's proposed point of diversion and the Objectors', and that water does not make it down to all of the users unless there is sufficient flow to keep water moving between the holes and through the creek's numerous bends. (See, e.g., testimony of William Christians.) However, no one, including the Applicant, professed to have any idea of the flow rates which would accomplish this. The amount of water necessary apparently ranges from very little during times when there is precipitation and/or other sources (such as intermittent springs) which are contributing, to a great deal of water under drier conditions.

Given the dearth of information on the amount of water necessary to allow the Objectors' their stockwatering uses, it was necessary for the Hearing Examiner to establish a bypass flow rate that was adequate to protect the senior uses, in order to be able to condition the permit so that the statutory criterion of "no adverse effect" could be met.<sup>1</sup> Since the Objectors were in general agreement that they have experienced water availability problems in the last three or four years during low summer flows (Applicant's flow data for 1986 shows June through August flows ranging from 4

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<sup>1</sup>The obvious alternative is to deny the Application on the basis that the Applicant did not provide substantial, credible evidence on the issue of adverse effect. However, given the difficulties inherent in developing evidence on this issue when senior water uses such as exempt stockwatering rights are not documented through permits or claims, the Hearing Examiner chose to use the information which was available in the record to develop conditions which would allow the permit to be granted.



cfs to nearly 0 cfs), and that there were not any shortages during the highest flows (approximately 12 to 23 cfs, according to the 1986 measurements), it seems probable--based on the admittedly limited amount of actual data available--that the necessary amount of bypass flow falls between 4 and 12 cfs.

Since the mean flow of Wolf Creek, based on the limited data, is 6 cfs, the Hearing Examiner chose to set the bypass flow at this level since it appears that this amount will be sufficient to protect the Objectors while still allowing the Applicant to obtain his full requested amount. (See Proposal for Decision, Conclusion of Law 9.)<sup>2</sup> Therefore, the bypass flow is not arbitrary, but is reasonably designed to fulfill the purposes of the Water Use Act by allowing development of water uses while protecting the water rights of prior appropriators, based on the information currently available.

The Applicant did not make any argument in his exceptions that he cannot adequately operate his proposed project under the restrictions proposed. Imposing a constant bypass flow upon

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<sup>2</sup>The Applicant's exception suggests that the 6 cfs bypass requirement was adopted simply because it had been used in Hilltop Angus, and no exceptions had been filed. (See Applicant's Exceptions, page 2.) This is not logistically possible, since the Proposal for Decision in this matter was issued well before the exception period had run in Hilltop Angus. As the discussion above indicates, the amount set for the bypass flow was based on the limited data in the record, and the statutory requirements of the Water Use Act. Imposition of the same bypass amount in both cases is the result of having the same flow measurement data, the same testimony by the Department witness, and a nearly identical set of Objectors (and Objectors' testimony) in both cases.

exercise of the permit may limit the Applicant's flexibility, but does not appear to limit his ability to receive the requested amount of water. Furthermore, the proposed conditions allow the bypass flow amount to be adjusted on the basis of more complete data. Therefore, the restrictions, if any, which the conditions place upon the Applicant's flexibility of operation may even be made less restrictive if the development of more complete data indicates that the water rights of the prior appropriators will be protected by a lower bypass flow requirement.

The Objectors may not need the full 6 cfs amount to be bypassed at all times during the Applicant's proposed period of diversion, depending upon the timing of the spring runoff and the amount of precipitation. However, there does not appear to be any administrable way of ensuring that the Objectors get their water unless the bypass flow is constantly maintained, since stream conditions potentially could vary markedly from day to day and since there may be a lag time of a couple of days between the time water passes the Applicant's point of diversion and the time that the lower objectors receive it.

The Applicant has suggested that the bypass requirement be eliminated for the month of March, since the Objectors did not specify that their stockwatering would be adversely affected by the Applicant's proposed diversion in the month of March. However, the flow data indicates that the flow in Wolf Creek dropped markedly between the measurement in March and the one in April. This rapid drop off, combined with much testimony that high water is

unpredictable, undependable, and that the timing varies greatly, indicates that the bypass should be left in place throughout the proposed period of diversion.

If the Applicant does not want a permit under the conditions which have been imposed, he is entitled to terminate the present application and reapply when he has data to support the granting of a permit with lower or no bypass flow requirements. However, if he chooses to proceed with the present Application, with the possibility that the conditions may be amended on the basis of more complete evidence, he must abide by the Permit conditions.

The Applicant suggests that he may be entitled to divert water pursuant to the Permit in this matter even if a bypass flow amount of 6 cfs does not go past him, if the reduced flow is the result of his exercise of his other water rights that do not require such a bypass. (See Applicant's Exceptions, pp. 3-4.) This is a misreading of the Proposal for Decision in a manner that circumvents the proposed permit conditions.

The Department agrees that the bypass flow requirement may not be applied to the Applicant's existing water rights through the decision in this matter. The Applicant can continue to exercise these rights as he has in the past, subject only to the conditions specific to the rights and to all prior and existing water rights. However, he may not exercise the Permit in this matter at the same time as he is exercising other of his water rights, unless the flow left in the creek after the exercise of the other right(s) is sufficient to maintain the required bypass flow amount over and above the diversion rate granted by the Permit in this matter. The

proposed permit condition requiring that the bypass flow be measured below all of the Applicant's points of diversion clearly establishes this intent. This condition does not limit the Applicant's existing water rights, since it restrains use of the present Permit only, based on the evidence in the record for this specific Application.

2. The Applicant argues that a measuring station must be established "at or near the Objectors' points of diversion" in order for the bypass flow to be evaluated, since otherwise there will be no way to determine whether the 6 cfs bypass amount is adequate or is too high. (See Applicant's Exceptions, pp. 4-5.) The Department agrees that such a measuring station is needed, in conjunction with the Applicant's measurements, in order to make a meaningful determination of the amount of water needed to satisfy the stockwatering needs at the lower end of Wolf Creek.

The Department is not obligated to install a downstream measuring station. The Department will take measurements in this matter for purposes of establishing reasonably designed conditions for the present Permit and any future Applications on Wolf Creek. However, due to the difficulty of access in the lower reaches of Wolf Creek, the Department will not take measurements more than once a month, unless it is possible to establish a recording station or to make other arrangements. The department also urges the Applicant and the Objectors to make written records of water availability on a regular basis, so that the flow record may be as complete as possible. (It should not be necessary to point out to the parties the benefits of having records in the eventuality of future problems or further water development on Wolf Creek.)

3. The Applicant's Exceptions also state that the Applicant's point of diversion, as specified in the proposed Order, the SW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 35, is incorrect, since the point of diversion will be in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 35, Township 19 North, Range 15 East.

The Applicant applied for diversion points in both the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  and the SW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 35 (see Application, Public Notice). The Applicant also testified at the hearing in the present matter that he intends to use the same diversion system as the one he has in place for Permit No. 18495-s41S. which was issued with the same two points of diversion. However, the map which the Applicant submitted at the hearing (Applicant's Exhibit 1) shows only the point of diversion in the SW $\frac{1}{4}$ SE SW $\frac{1}{4}$  of Section 35, and field verification of Permit 184954 ( made on September 24, 1987 and agreed to by the Applicant) indicates that the only point of diversion being utilized is the one in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 35. Therefore, the Permit will be amended to show only this location as the point of diversion.

WHEREFORE, based upon the record in this matter, the Department makes the following:

#### ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 56031-s41S is hereby granted to Floyd R. Blair to appropriate 450

gpm up to 24.00 acre-feet of water per year for supplemental sprinkler irrigation of 30 acres; 25 acres in the SW $\frac{1}{4}$  of Section 35 and 5 acres in the W $\frac{1}{2}$ W $\frac{1}{2}$ SE $\frac{1}{4}$  of Section 35, Township 19 North, Range 15 East, Fergus County, Montana.

The water will be diverted from Wolf Creek, a tributary of the Judith River, by means of a pump located at a point in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 35, and pumped into an existing reservoir located in the E $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 35, Township 19 North, Range 15 East for storage for later use, or into the Applicant's sprinkler system for direct application to the place of use. The period of use shall be March 15 through March 31, and May 31 through June 30, of each year. The priority date for this Permit is November 7, 1984 at 3:00 a.m.

The Permit in this matter is issued subject to the following express terms, conditions, restrictions, and limitations:

A. This Permit is subject to all period and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

B. Issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by exercise of this Permit, nor does the Department, in issuing this Permit, acknowledge any liability for damages cause by exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

C. The Permittee shall allow the waters to remain in the source of supply at all times when the water is not reasonably required for the Permittee's Permit uses.

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D. The Permittee shall bypass a minimum of 6 cfs in Wolf Creek at all times he is diverting. During the period of May 31 through June 30 of each year, the Permittee must also bypass an additional 1.67 cfs to meet the senior water use of Hilltop Angus Ranch, at all times that Hilltop Angus Ranch is diverting. At any time the Permittee wishes to divert during the May 31-June 30 time period, he must contact Hilltop Angus Ranch to ascertain if Hilltop is irrigating or intends to irrigate that day, and must bypass an additional 1.67 cfs if Hilltop answers in the affirmative. Alternatively, the Permittee may divert water without first contacting Hilltop Angus Ranch if he bypasses 7.67 cfs at all times during the May 31 to June 30 period.

The required bypass shall be established by placing a staff gauge below all of the Permittee's points of diversion and checking the flow measurement during the times Permittee is diverting, or alternatively, by placing the gauge above the Permittee's points of diversion and only diverting when the flow is equal to or greater than the total of the required bypass flow plus the amount of the Permittee's own diversion. The gauge shall be checked each day the Applicant diverts, prior to his diverting water from Wolf Creek.

E. Once the Permittee has decided upon the site of the staff gauge, he must obtain the assistance of the Lewistown Water Rights Bureau Field Office or the SCS, or other technically qualified help, in measuring the creek at the site and properly placing and adjusting the gauge to ensure accurate records.



The staff gauge must be left in place at all times the Applicant is diverting. If the gauge is washed out, or the creek bed at the site of the gauge is altered by flood or other event, the Applicant must obtain expert assistance in readjusting the gauge for accurate readings.

F. The Permittee shall record the flow rates, volumes, and times of his diversions, and shall further record the daily flow reading from the staff gauge. These records shall be submitted to the Department by November 30 of each year, and also shall be made available to the Department upon request.

G. Department field personnel will take flow measurements, at least once a month, during the Applicant's proposed periods of diversion under this Permit (March and June). These measurements are to be taken near the mouth of Wolf Creek or at such locations as the field personnel find to be adequate to determine if water is reaching the Objectors in sufficient quantity that they may reasonably utilize their water rights. The field personnel may, in their discretion, contact the water users downstream from the Applicant with regard to water availability, for purposes of comparing or supplementing actual flow measurements.

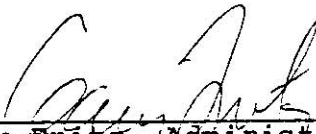
Such measurements shall be taken by the Department personnel for two years or until the instream flow needed to protect stockwater uses on the source is adequately established.

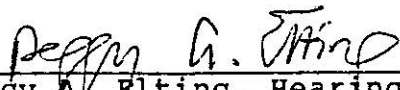
H. After a minimum of two years of diversion and record keeping by the Permittee and the Department, any party may request a Department review of the bypass flow requirement. The Department

will then contact the parties and arrange to have flow information exchanged, and to schedule a hearing on any proposed modification of the bypass flow requirement, if necessary.

The amount of flow which the Permittee must bypass may be amended if a review of the Permittee's data and the Objectors' water availability during the corresponding time period indicate that the amendment is warranted.

DONE this 24 day of August, 1988.

  
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Gary Fritz, Administrator  
Department of Natural  
Resources and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620-2301  
(406) 444 - 6605

  
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Peggy A. Elting, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620-2301  
(406) 444 - 6612

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing FINAL ORDER was served by mail upon all parties of record at their address or addresses this 26th day of August, 1988, as follows:

Floyd Blair  
Route 1, Box 45  
Denton, MT 59430

Barber Ranch, Inc  
Robert Barber, President  
Box 58  
Denton, MT 59430

John R. Carter  
Box 933  
Denton, MT 59430

Merle T. Boyce  
Box 74  
Winifred, MT 59489

Timothy J. O'Hare  
Suite 255, Federal Bldg.  
Lewistown, MT 59457

Ted Doney  
P O Box 1185  
Helena, MT 59624-1185

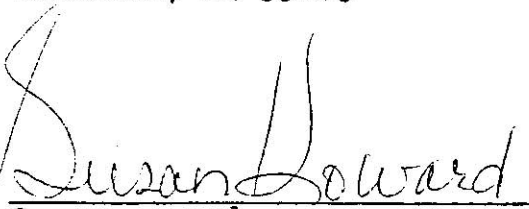
Twin Butte Ranch  
% John F. Barber  
Route 1, Box 20  
Denton, MT 59430

William A. Christians  
Gary T. Christians  
Route Box 50  
Denton, MT 59430

Kenneth and Neil Glass  
Box 958  
Denton, MT 59430

Sam Rodriguez  
Lewistown Field Manager  
P O Box 438  
Lewistown, MT 59457

John R. Christensen  
P O Box 556  
Stanford, MT 59479

  
Susan Howard  
Hearing Reporter

**CASE # 56031**

BEFORE THE DEPARTMENT  
OF NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION )  
FOR BENEFICIAL WATER USE PERMIT ) PROPOSAL FOR DECISION  
NO. 56031-41S BY FLOYD R. BLAIR )

\* \* \* \* \*

Pursuant to the Montana Water use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on January 11, 1988.

Floyd R. Blair, the Applicant in this matter, appeared at the hearing in person.

Objector Twin Butte Ranch appeared at the hearing by and through ranch operator Don Barber, ranch co-owner John Barber, and counsel Timothy J. O'Hare.

Objector Barber Ranch, Inc. appeared at the hearing by and through Peter Barber and counsel Timothy J. O'Hare.

Objector William A. Christians appeared at the hearing in person, and by and through counsel John R. Christensen. Objector Gary T. Christians appeared at the hearing by and through William Christians and counsel John R. Christensen.

Objector John R. Carter appeared at the hearing in person, and by and through counsel John R. Christensen.

Objectors Kenneth and Neil Glass appeared at the hearing by and through counsel John R. Christensen.

Untimely Objector Merle T. Boyce appeared at the hearing by and through counsel John R. Christensen. Mr. Christensen stated that he further represented the interests of Vincent and Evelyn Linse; however, the Linses did not file an objection in this matter.

Sterling Sundheim, Engineer with the Lewistown Water Rights Bureau Field Office, appeared as staff expert witness for the Department of Natural Resources and Conservation (hereafter, the "Department").

#### EXHIBITS

The Applicant offered one exhibit for inclusion in the record in this matter.

Applicant's Exhibit 1 (six pages) consists of a three-page memorandum which contains a synopsis of the Applicant's testimony; one photocopied USGS quadrangle map (partial) showing the Applicant's proposed point of diversion, place of storage, and place of use; one photocopied page of 1986 flow measurement records from a gauge at the Applicant's point of diversion, with an attached handwritten list of monthly precipitation measurements for 1986; and one photocopied page of monthly and yearly discharge data from a USGS gauge near Stanford, Montana.

Objection was made to inclusion of the Stanford gaging data on the basis that it is irrelevant. Since the data was taken on the source of supply (Wolf Creek), albeit upstream, it is not irrelevant and the objection hereby is overruled. However, based on testimony that the data is not entirely representative of flow patterns on the creek in the area of concern, the data has been given little weight.

Applicant's Exhibit 1 has been accepted for the record.

The Objectors did not offer any exhibits for inclusion in the record in this matter.

The Department did not offer any exhibits for inclusion in the record in this matter. The Department file, which contains the originals of the Application and the Objections, correspondence between the Department and the parties, Department reports and processing documents, and Sterling Sundheim's October 27, 1987 Field Report, was made available at the hearing for review by all parties. No party made objection to any part of the file. Therefore, the Department file in this matter is included in the record in its entirety.

#### PRELIMINARY MATTERS

The Application in this matter went to public notice without a flow rate being specified for the proposed diversion. The only indication of the possible flow rate is the specification of a 2000 gpm pump as the means of diversion. The October 27, 1987 Field Report by Sterling Sundheim indicates that the water would be diverted at 1000 gpm. However, the Applicant subsequently agreed to modification of Permit No. 18495-s41S, which utilizes the same pump as would be used for the proposed diversion in this matter, to a flow rate of 350 gpm, which was found to be the rate at which the pump will divert into the sprinkler system under Permit No. 18495. At the hearing in this matter, the Applicant testified that he intends to divert at a flow rate of 450 gpm, which is the amount the pump will pull when the water is not

being fed through a sprinkler system. (See Finding of Fact 6, infra.)

There is no indication that the absence of a specified flow rate in the Public Notice has prejudiced any party or potential party to this matter. Since the same parties objected to the Application and appeared at the hearing in this matter as had objected and appeared at the hearing on the other Application on Wolf Creek (Hilltop Angus Ranch), in addition to the two stockwater users located between the points of diversion for this Application and that of Hilltop Angus Ranch, it appears that all entities who might have objected to the present Application are parties to this matter. No party argued at the hearing in this matter that the conflicting information concerning the intended flow rate interfered with their ability to present effective argument. Indeed, testimony by the Objectors made it clear that the particular flow rate is without consequence, since they oppose the diversion of any additional water from Wolf Creek.

Therefore, the Hearing Examiner finds that the intended rate of diversion is 450 gpm, and further finds that lack of notice of a specified flow rate has not prejudiced any party to this matter.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following proposed Findings of Fact, Conclusions of Law, and Order.



### FINDINGS OF FACT

1. MCA Section 85-2-302 states, in relevant part, "Except as otherwise provided in (1) through (3) of 85-2-306, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or distribution works therefor except by applying for and receiving a permit from the department." The exceptions to permit requirements listed in §85-2-306 do not apply in the present matter.

2. Application for Beneficial Water Use Permit No. 56031-41S was duly filed with the Department of Natural Resources and Conservation on November 7, 1984 at 3:00 p.m.

3. The pertinent portions of the Application were published in the Lewistown News-Argus, a newspaper of general circulation in the area of the source, on December 5 and 12, 1984.

4. The source of water for the proposed appropriation is surface water from Wolf Creek, a tributary of the Judith River.

5. The Applicant is requesting 450 gallons per minute ("gpm") up to 24.00 acre-feet of water per year for supplemental sprinkler irrigation of 25 acres in the SW $\frac{1}{4}$  of Section 35 and 5 acres in the W $\frac{1}{2}$ W $\frac{1}{2}$ SE $\frac{1}{4}$  of Section 35, Township 19 North, Range 15 East, Fergus County, Montana. The water is to be diverted from Wolf Creek by means of a pump located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 35, Township 19 North, Range 15 East for sprinkler irrigation of the place of use or transportation into a reservoir (E $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 35), from whence it will later be pumped for sprinkler irrigation of the place of use from a diversion site located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 35, Township 19 North, Range 15 East, Fergus County, Montana.

The Applicant requests diversion periods of March 15 through March 31, and May 31 through June 30, of each year.

6. The Applicant testified that he intends to irrigate alfalfa on the propose place of use, rotating crops to small grains at some future date. He intends to irrigate the proposed place of use approximately three times prior to the first cutting toward the end of June, then irrigate again for a second cutting in July or August, and irrigate for a third cutting in August if it is possible. (See Applicant's Exhibit 1.) The time periods for irrigation and cutting would be moved to later in the season if runoff comes late, or earlier if runoff is early.

In order to obtain the desired number of irrigations, the Applicant intends to use the water applied for under this Application to supplement Beneficial Water Right Permits Nos. 18495-s41S and 33738-s41S, which are appurtenant to the proposed place of use. Permit No. 18495-s41S has been verified for 350 gpm up to 35 acre-feet of water per year from Wolf Creek to irrigate the same 30 acres, with a diversion period of April 1 through May 30. Permit No. 33738-s41S has been verified for 55 acre-feet of water per year from an unnamed tributary to Wolf Creek for irrigation of the same 30-acre place of use. (No flow rate was established for Permit No. 33738, since it is on an intermittent stream.) The water is diverted from January 1 through December 31 of each year for stockwater pursuant to Permit No. 33738, while the period of use is March 15 through November 30 for irrigation purposes.

7. The combined volume of the two Permits now appurtenant to the proposed place of use and of this Application is 114 acre-feet of water per year. Reference to the Soil Conservation Service Irrigation Guide for Montana (1987) shows that alfalfa crop needs for a dry year are 88.6 acre-feet of water per year, leaving a volume of 25.4 acre-feet of water of the requested 114 acre-feet per year in excess of crop requirements, assuming the Applicant is able to divert his entire permitted and applied-for volumes. However, the Applicant testified that he may only average 5 acre-feet of water per year from the intermittent stream under Permit No. 33738-s41S, instead of the 55 acre-feet for irrigation and the 5 acre-feet for stockwater granted by the Permit. He estimated that the 40 acre-feet capacity dam on the unnamed tributary would fill completely less than once in 10 years. Under these circumstances, the Applicant is not obtaining any water in excess of seasonal crop requirements if the present Application is granted.

Any water which the Applicant is able to divert in excess of crop requirements can be utilized by the Applicant for carryover storage. (See October 5, 1987 Permit Verification of P33738-s41S by Sterling Sundheim.)

8. The Applicant's intent is to divert water by means of the pump which already is in place for Permit No. 18495-s41S, which has a different period of diversion than the present Application: Permit No. 18495's diversion period is April 1 through May 30, while the proposed periods of diversion for the present Application are March 15 through March 31 and May 31 through

June 30. Water would be pumped from the established pump site in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 35, through a 6-inch diameter plastic pipe, to an existing reservoir in the E $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 35 (Permit No. 33738) for storage for later use, or would be used for direct sprinkler application through a 5-inch diameter main line which is fed through the plastic pipe. The water would be applied by means of handlines and sprinklers.

The pump which the Applicant proposes to use has been verified for only 350 gpm, while the Applicant intends to divert at a flow rate of 450 gpm. (See Preliminary Matters.) However, the flow rate that the pump is capable of diverting is reduced when the water is going through a sprinkler system, due to friction losses and other factors, while pumping from the creek into the reservoir may be done at a higher flow rate. Therefore, the existing pump should be capable of diverting water from Wolf Creek for storage at a flow rate of 450 gpm. (Testimony of Sterling Sundheim.)

9. The Objectors in this matter are objecting on the basis of possible adverse effects to their downstream stockwatering rights.

The Objectors expressed concern that the Applicant will not bypass enough flow to meet their stockwatering needs, which run all the way to the Judith River. They testified that too small a flow will not reach them, and that the creek becomes very "alkali" (and thereby unfit for stockwatering purposes) if the flow is reduced too greatly. (Testimony of Christians, Carter,

Glass, Don Barber.) However, none of the Objectors could specify what flow of water is required to maintain adequate stockwater all the way to the mouth of the creek.<sup>1</sup>

Sterling Sundheim stated that, based on the number of cattle the Objectors testified to watering from Wolf Creek, it would require approximately 42 gpm continuous flow, plus sufficient carriage water to carry it to the mouth of Wolf Creek to maintain stockwater. He stated that the necessary amount of carriage water would vary throughout the year, with a relatively small flow being sufficient during times when Wolf Creek was receiving water from precipitation or springs, while other times of the year may require a great deal more carriage water. In addition to meeting stockwater needs, the Applicant also would have to bypass enough water to meet the water use of Hilltop Angus Ranch, which has been granted a permit senior in priority to the Applicant's. See In the Matter of Application for Beneficial Water Use Permit No. 55943-s41S by Hilltop Angus Ranch.

10. Many of the Objectors also testified that they believe Wolf Creek will dry up earlier in the season if anyone is allowed

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<sup>1</sup> The Objectors additionally alleged adverse effect from the dam on Wolf Creek that the Applicant had installed pursuant to another permit. However, any problems that the Objectors may be experiencing as the result of the dam cannot properly be addressed in the forum of this hearing. The Objectors did not allege any nexus between the existence and use of the dam and the proposed project in this matter, except to indicate that they believe the Applicant's utilization of water is causing some undetermined effect on their own uses. The effects of the Applicant's other projects is taken into account in looking at the cumulative effect of withdrawals and of water availability, but concerns over the other projects are not a basis for denial of the present Application, and cannot be addressed within the scope of the present Application.

to pump upstream, even during high water. They believe that high water flows in the creek during the spring cause water to be stored in the creek bed and banks which seeps out during the rest of the season to recharge the flow. (Testimony of Objector Glass.) However, none of the Objectors had any estimate as to how much longer they felt the creek might run if the amount of water the Applicant proposes to appropriate was left in the stream, rather than being diverted.

The record in this matter indicates that, more likely than not, the Applicant's proposed appropriation will not discernibly affect the length of time that Wolf Creek flows during the summer. The Applicant stated that he does not know if the early high water levels affect the maintenance of flow in Wolf Creek, but that he believes, based on experience, that the main factors which determine the flow of Wolf Creek during the summer months are precipitation and temperature. Sterling Sundheim stated that it probably would not be possible to tell a difference in water availability later in the season due to water being taken out during flood or high water stages, even if records were kept.

11. Testimony in this matter indicates that the flow of Wolf Creek is unpredictable, both in terms of amounts and in the timing of high water.

The limited flow data available in the area of the Applicant's point of diversion, consisting of flow measurements taken by the Applicant and Sterling Sundheim in 1986 (Field Report, Figure 3; Applicant's Exhibit 1), substantiates the parties' testimony that flows in the creek are unpredictable.

Flow measurements fluctuated from nearly 23 cfs in March down to less than 7 cfs during the second week of April, up to more than 17 cfs by the end of April, then down to less than 1 cfs by the end of June.

The Applicant testified that high water occurs any time between March and June (see Applicant's Exhibit 1). Sterling Sundheim referred to the flow data from the Stanford gaging station (October 27, 1987 Field Report, Figure 4), which he stated indicates that peak flows can be expected in Wolf Creek during May or June;<sup>2</sup> however, that the data from the Applicant's area (Report, Figure 3) indicates that the lower reaches of Wolf Creek experience a peak flow in March or April due to snowmelt on the lowland areas, and another peak flow later from higher elevation snowmelt and from rain. The Objectors also were generally in agreement that high water may occur anytime from March into June, with the high flow amounts, timing, and length of occurrence varying widely depending upon the year (testimony of Carter, Glass, Christians, Don Barber), although Peter Barber testified that he does not believe high water ever occurs in June.

Mr. Sundheim stated that he did not know if 1986 was an average year on Wolf Creek, but that he does not think the March and April high flows constituted a "flood stage" on the creek.

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<sup>2</sup> USGS flow measurements taken on Wolf Creek at a gaging station near Stanford also show the unpredictability of flows in that part of the creek. During the 23 years of flow measurements taken between 1920 and 1971, the yearly mean discharge ranged from 1.55 cfs (1961) to 27.3 cfs (1970). (November 10, 1987 Field Report, Figure 4.) However, this data also shows that in most years stream flow noticeably increases for a period of time early in the year, before tapering off. (Testimony of Sterling Sundheim.)



The Applicant stated that he believes 1986 was a fairly dry year, while Objector Christians believes the spring flow may have been higher than normal due to rain in the fall of 1985. (Testimony; see also Field Report, page 2.)

There does not appear to be such a thing as a "normal" flow pattern, based on the testimony and available evidence.<sup>3</sup>

However, the "mean" flow of Wolf Creek, based on the March-November, 1986 flow data, is slightly greater than 6 cfs.

12. A review of the Department records does not disclose other planned uses or developments on Wolf Creek for which a permit has been issued or for which water has been reserved.

Based upon the foregoing Findings of Fact and upon the record in this matter, the Hearing Examiner makes the following:

#### PROPOSED CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural rules have been fulfilled, therefore the matter was properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the following criteria are met:

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<sup>3</sup> Sterling Sundheim testified that normally accepted flow prediction methods, such as the Orsborn method, have not proved to be accurate when applied to Wolf Creek. The methods which Mr. Sundheim applied all produced predicted flows higher than the flows which actually occur in Wolf Creek.

(1)(a) there are unappropriated waters in the source of supply:

(i) at times when the water can be put to the use proposed by the applicant;

(ii) in the amount the applicant seeks to appropriate; and

(iii) throughout the period during which the applicant seeks to appropriate the amount requested is available;

(b) the water rights of a prior appropriator will not be adversely affected;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

4. The proposed use of water, irrigation, is a beneficial use of water. See MCA §85-2-102(2).

5. The proposed use of water will not interfere unreasonably with other planned uses or developments for which a permit has been granted or for which water has been reserved. See Finding of Fact 12.

6. The proposed means of diversion, construction, and operation of the appropriation works are adequate. See Finding of Fact 8.

7. There are unappropriated waters in the source of supply, in the amount the Applicant is seeking to appropriate, at times when the water can be put to the use proposed by the Applicant.

"Unappropriated waters" are those waters which have not been diverted, impounded, withdrawn, or reserved for future use by a public agency. See generally MCA §85-2-102(1). Whether unappropriated waters are available in the source of supply can be determined on the basis of (a) whether there is water physically available at the Applicant's proposed point of diversion throughout the period of diversion, in at least some years (water is not unavailable due to its being diverted, impounded, or withdrawn by upstream water users), and (b) whether the water which is physically available to the Applicant is legally available (not needed downstream to fulfill senior water users), and the Applicant therefore can utilize the requested amount of water throughout the period of appropriation in some years without being called by a senior user. See In the Matter of Application for Beneficial Water Use Permit No. 60662-s76G by Wayne and Kathleen Hadley (March 21, 1988 Proposal for Decision).<sup>\*</sup>

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<sup>\*</sup> Counsel for the Objectors argue that the Department may not issue permits on streams where the normal streamflow is not greater than the total water rights claimed in the adjudication process and/or granted in the preliminary decree, pursuant to the district court ruling in In Re Don Brown First Judicial District Case No. 50612, June 15, 1987. However, the Department does not place this interpretation on the Don Brown decision; rather, it takes the position that it may utilize available facts and records to determine if there is unappropriated water available instead of relying wholly on a comparison of streamflows to claims. For a general discussion of this issue, see Stone, 1988 Montana Water Law Supplement, pages 11 through 14.

Water is physically available at the Applicant's proposed point of diversion in the amount the Applicant is requesting, in at least some years, as evidenced by the flow data from 1986. (Field Report, Figure 3.) However, the record does not provide substantial credible evidence that there will be any year that the Applicant could divert the requested amount of water throughout the proposed period of diversion without being called by a senior water user. The only flow data available indicates that the flow of Wolf Creek was too low after the middle of June in 1986 to supply the Objectors' water requirements. Testimony indicates that the point in time at which the flow of Wolf Creek is too low to allow the Applicant to divert without triggering calls from the downstream stockwater users may vary from as early as May to as late as July depending on when runoff and the resultant flood and high water levels occur during any given year, the years when water is available through June resulting from late high water.

8. Although the record in this matter indicates that the amount of water the Applicant is requesting is not available throughout the period during which the Applicant seeks to appropriate, the Department may issue a permit subject to terms, conditions, restrictions, and limitations which are necessary to satisfy the criteria of §85-2-311. See MCA §85-2-312(1). Therefore, a permit may be granted if it can be conditioned so as to limit the Applicant's period of diversion to those times when there are unappropriated waters in the source of supply in the

amount the Applicant is seeking to appropriate, providing the Applicant can put the water to the proposed use under the conditions which have been imposed.

In order to ensure that the Applicant will divert water only during those times when unappropriated water is both physically and legally available, it is necessary to limit the Applicant's appropriation to times when the flow of Wolf Creek is sufficient to meet the Applicant's requested amount of diversion over and above downstream senior uses. (As noted above in Conclusion of Law 7, water is physically available in the requested amount at the proposed point of diversion throughout the period of appropriation, in at least some years.) As further noted above, the time period when water is available for appropriation varies from year to year, even though the period of unappropriated water availability does fall within the Applicant's proposed March 15 through March 31, May 31 through June 30 period of appropriation. Therefore, conditioning a permit by limiting the period of diversion to specific dates would not be helpful in this case, since it would not achieve the desired result of limiting the Applicant's diversion to times when there are unappropriated waters available.<sup>5</sup>

However, conditioning the Applicant's permit by allowing water to be diverted only at those times when the flow of Wolf Creek is sufficient to fulfill the Applicant's proposed diversion

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<sup>5</sup> For example, cutting back the Applicant's period of diversion to June 15 on the basis of the 1986 flow data would not provide adequate protection to downstream uses in years when low water begins earlier than June 15.

and still make it down the entire length of the creek (thereby assuring the Objectors of adequate stockwater in the stream) will ensure that the statutory criteria are met.

9. The obvious problem, as in the Matter of the Application for Beneficial Water Use Permit No. 55943-41S by Hilltop Angus Ranch in which many of the same Objectors were involved, is deciding what flow rate cutoff to impose. As the record indicates, neither the parties nor the Department witness were able to specify exactly how much flow would be required in Order to keep Wolf Creek running past the Objectors. The only estimate was Sterling Sundheim's proffered estimate that it would take 42 gpm continuous flow plus carriage water in amounts varying from a small flow to a "great deal" of water (see Finding of Fact 9), depending upon the time of year and upon such other factors as precipitation.

As discussed in Finding of Fact 10, the flow in Wolf Creek varies widely enough that there does not appear to be any norm; however, the mean (average) flow, as determined on the basis of the limited flow data available, is approximately 6 cfs. The water user immediately senior in priority to the Applicant, Hilltop Angus Ranch, has been required to bypass this 6 cfs amount to ensure that the stockwater needs downstream on Wolf Creek are met. See April 11, 1988 Proposal for Decision In re Hilltop Angus Ranch. In order for Hilltop Angus to be able to fulfill its own water right, it must receive a flow of 7.67 cfs or greater (the bypass flow of 6 cfs plus its diversion rate of 750 gpm). Therefore, if the Applicant is allowed to divert only

when he can bypass a flow of 7.67 cfs, the senior water use requirements of the Objectors and downstream water users (Hilltop) should be adequately protected.

Even with this limitation imposed on the Applicant's appropriation, the record indicates that the Applicant will be able to divert the full requested amount of water within his period of diversion. At the proposed pumping rate of 450 gpm, the Applicant will divert his full volume in 289.6 hours (12 days). As the 1986 data clearly indicates, there are years when the April-June flow of Wolf Creek is adequate to fulfill both the Applicant's requested flow and the bypass flow for longer than 290 hours.

10. Since it is possible that imposing a bypass flow of 7.67 cfs will restrict the Applicant's appropriation unnecessarily if less flow is required to meet downstream needs, any permit issued in this matter will be conditioned so as to allow the bypass flow to be amended in the event that the Applicant so requests and can provide data sufficient to show that the downstream uses may be filled by a smaller flow. In the event that the 7.67 cfs bypass flow proves inadequate to protect the downstream stockwater uses, the Objectors will also be entitled to request an amendment.

11. The record provides substantial credible evidence that the water rights of prior appropriators will not be adversely affected.

The only adverse effect which the Objectors have alleged is the possibility that Wolf Creek may dry up sooner in the summer if the Applicant is allowed to divert during high water in the



spring. However, the Objectors provided no evidence or argument to counter the Applicant's testimony that the time at which the creek dries up is a result of temperature and precipitation factors, rather than of diversion during high water stages. Furthermore, there is no information to suggest why, if enough water is left in the creek during Applicant's diversion to keep the creek running along its length (keeping the bed saturated), there should be any effect on the timing of water availability.

WHEREFORE, based upon the foregoing proposed Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations specified below, Application for Beneficial Water Use Permit No. 56031-s41S is hereby granted to Floyd R. Blair to appropriate 450 gpm up to 24.00 acre-feet of water per year for supplemental sprinkler irrigation of 30 acres; 25 acres in the SW $\frac{1}{4}$  of Section 35 and 5 acres in the W $\frac{1}{2}$ W $\frac{1}{2}$ SE $\frac{1}{4}$  of Section 35, Township 19 North, Range 15 East, Fergus County, Montana.

The water will be diverted from Wolf Creek, a tributary of the Judith River, by means of a pump located at a point in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 35, and pumped into an existing reservoir located in the E $\frac{1}{2}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 35, Township 19 North, Range 15 East for storage for later use, or into the Applicant's sprinkler system for direct application to the place of use. The

period of use shall be March 15 through March 31, and May 31 through June 30, of each year. The priority date for this Permit is November 7, 1984 at 3:00 p.m.

The Permit in this matter is issued subject to the following express terms, conditions, restrictions, and limitations:

A. This Permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

B. Issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by exercise of this Permit, nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

C. The Permittee shall allow the waters to remain in the source of supply at all times when the water is not reasonably required for the Permittee's Permit uses.

D. The Permittee shall bypass a minimum of 6 cfs in Wolf Creek at all times he is diverting. During the period of May 31 through June 30 of each year, the Permittee must also bypass an additional 1.67 cfs to meet the senior water use of Hilltop Angus Ranch, at all times that Hilltop Angus Ranch is diverting. At any time the Permittee wishes to divert during the May 31-June 30 time period, he must contact Hilltop Angus Ranch to ascertain if

Hilltop is irrigating or intends to irrigate that day, and must bypass an additional 1.67 cfs if Hilltop answers in the affirmative. Alternatively, the Permittee may divert water without first contacting Hilltop Angus Ranch if he bypasses 7.67 cfs at all times during the May 31 to June 30 period.

The required bypass shall be established by placing a staff gauge below all of the Permittee's points of diversion and checking the flow measurement during the times Permittee is diverting, or alternatively, by placing the gauge above the Permittee's points of diversion and only diverting when the flow is equal to or greater than the total of the required bypass flow plus the amount of the Permittee's own diversion. The gauge shall be checked each day the Applicant diverts, prior to his diverting water from Wolf Creek.

E. Once the Permittee has decided upon the site of the staff gauge, he must obtain the assistance of the Lewistown Water Rights Bureau Field Office or the SCS, or other technically qualified help, in measuring the creek at the site and properly placing and adjusting the gauge to ensure accurate records.

The staff gauge must be left in place at all times the Applicant is diverting. If the gauge is washed out, or the creek bed at the site of the gauge is altered by flood or other event, the Applicant must obtain expert assistance in readjusting the gauge for accurate readings.

F. The Permittee shall record the flow rates, volumes, and times of his diversions, and shall further record the daily flow reading from the staff gauge. These records shall be submitted to the Department by November 30 of each year, and also shall be made available to the Department upon request.

G. After a minimum of two years of diversion and record keeping by the Permittee, any party may request a Department review of the bypass flow requirement. The amount of flow which the Permittee must bypass may be amended if a review of the Permittee's data and the Objectors' water availability during the corresponding time period indicate that the amendment is warranted.

#### NOTICE

This proposal is a recommendation, not a final decision. All parties are urged to review carefully the terms of the proposed order, including the legal land descriptions. Any party adversely affected by the Proposal for Decision may file exceptions thereto with the Hearing Examiner (1520 E. 6th Ave., Helena, MT 59620-2301); the exceptions must be filed within 20 days after the proposal is served upon the party. MCA §2-4-623.

Exceptions must specifically set forth the precise portions of the proposed decision to which exception is taken, the reason for the exception, and authorities upon which the exception relies. No final decision shall be made until after the expiration of the time period for filing exceptions, and the due consideration of any exceptions which have been timely filed.

Any adversely affected party has the right to present briefs and oral arguments pertaining to its exceptions before the Water Resources Division Administrator. A request for oral argument must be made in writing and be filed with the Hearing Examiner within 20 days after service of the proposal upon the party. MCA §2-4-621(1). Written requests for an oral argument must specifically set forth the party's exceptions to the proposed decision.

Oral arguments held pursuant to such a request normally will be scheduled for the locale where the contested case hearing in this matter was held. However, the party asking for oral argument may request a different location at the time the exception is filed.

Parties who attend oral argument are not entitled to introduce new evidence, give additional testimony, offer additional exhibits, or introduce new witnesses. Rather, the parties will be limited to discussion of the evidence which already is present in the record. Oral argument will be restricted to those issues which the parties have set forth in their written request for oral argument.

DONE this 22<sup>nd</sup> day of April, 1988.

Peggy A. Eating  
Peggy A. Eating, Hearing Examiner  
Department of Natural Resources  
and Conservation  
1520 E. 6th Avenue  
Helena, Montana 59620-2301  
(406) 444 - 6612

**CASE # 56031**

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document was served by first class mail to all parties of record at their address or addresses this 22nd day of April, 1988, as follows:

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Denton, MT 59430

Barber Ranch, Inc.  
Robert Barber, President  
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John R. Carter  
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Merle T. Boyce  
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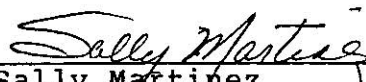
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Sally Martinez  
Secretary

**CASE # 56031**